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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

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No. ~~795~~ 72

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B. K. ISAACS, AS TRUSTEE IN BANKRUPTCY, OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT, *Appellant*,

vs.

HOBBS TIE & TIMBER CO., A CORPORATION, *Appellee*.

—o—

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

—o—

MOTION TO BRING UP THE ENTIRE RECORD AND CAUSE

—o—

WILLIAM R. WATKINS,
Counsel for Appellant.

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MOTION TO BRING UP THE ENTIRE RECORD AND CAUSE

Comes now B. K. ISAACS, appellant in this cause in the United States Circuit Court of Appeals for the Eighth Circuit, which is now pending in this Court on a question certified by said Circuit Court of Appeals, and respectfully moves that this Honorable Court issue its writ of certiorari commanding that Court to certify and send to this Court a true and complete transcript of the record in this cause.

A certified transcript of the record, together with nine printed copies, have been lodged with the clerk of this Court as exhibits to this motion.

STATEMENT

September 27, 1921, J. L. Cunningham gave a $79,000.00 note due October 1, 1924, to the Holland Banking Company, securing the payment thereof by a mortgage on 12,000 acres of timber land, and an abandoned railroad, situated in three counties in the Western district of Arkansas. (R. 11.) Cunningham died in May, 1924, leaving his entire estate, by will, to his wife, Henrietta E. Cunningham (R. 21). Cunningham and his wife conveyed the land to T. P. Perkins, in April, 1924, in trust, to enable Perkins to sell it. September 14, 1928, Mrs. Cunningham having been adjudicated a bankrupt, B. K. Isaacs was appointed as Trustee of her estate by the United States District Court for the Northern District of Texas, at Fort Worth. (R. 21-22.) The mortgaged land in Arkansas was duly scheduled in bankruptcy schedules filed August 20, 1928, and the trustee, upon his appointment and qualification, entered into possession of said premises (R. 22); on October 17, 1928, Perkins, reciting his trust and the desire of the bankrupt that said property be transferred to her trustee, conveyed the property to B. K. Isaacs, as Trustee in Bankruptcy of Mrs. Cunningham, the deed to that effect having been recorded October 29, 1928 (R. 22).

The aforementioned note was transferred by the Holland Banking Company to the Hobbs Tie & Tim-

ber Company, the appellee, December 7, 1928. (R. 11.) The present suit was instituted five days later in the Chancery Court of Benton County, Arkansas (R. 10-11). Appellant, as Trustee, was named a party defendant, and foreclosure against the mortgaged property for the amount of $62,000.00 unpaid on the note prayed for.

Appellant removed the case to the United States District Court for the Western District of Arkansas (R. 14-19) where he answered (R. 20-26), setting up the facts aforesaid, and that neither he nor the Court wherein he was appointed as Trustee, had consented to the institution of the foreclosure proceeding; that the bankrupt estate was insolvent; that the mortgaged property, consisting of 12,000 acres of land on which there is an abandoned railroad and in excess of 25,000,000 feet of uncut hardwood timber, is worth more than the $125,000, or an excess over the claim of the mortgagee of more than $60,000. That a sale, otherwise than by the Court of Bankruptcy, will result in loss and detriment to the general creditors; that a sale will embarrass and impede the due and orderly administration of the bankrupt estates; that he has not had time since his appointment to fully inspect the property and ascertain the facts in reference thereto in order to enable him to properly administer thereon. That the prevailing condition in the lumber industry is such that a forced sale at the particular time would result in a sacrifice of the property. That it would be to the best interests of the estates that he be given time and an opportunity to dispose of the property at

private sale in due course of administration, after he has obtained an accurate knowledge of the amount, quality and value of the timber, and after he has had an opportunity of putting the property on the market. That a cruise of the timber had been made but it was in possession of the plaintiff; that plaintiff has, for many years, endeavored to acquire the property; that it has long been conversant with the property—being in the tie and timber business in five states and furnishing ties and timber to the Frisco Railroad Company; that it would be unjust and inequitable to force a speedy public sale of the property, at which the plaintiff would undoubtedly be the sole bidder, and at which it would undoubtedly buy the property at an amount not in excess of the mortgage indebtedness.

That the property, being in the *custody* and *possession* of the defendant as Trustee in Bankruptcy, the Court had no jurisdiction to administer upon it or determine when or how it should be sold, or to order a sale thereof; all of such being solely and exclusively matters of administration for the Court of Bankruptcy. He also plead that he had been ordered to sell the property by an order entered September 14, 1928.

Appellee filed a motion to dismiss that part of the answer seeking to delay judgment and sale, and for judgment and order of sale on the pleadings. (R. 25-26.)

The trial court sustained the motion for judgment on the pleadings (R. 28), and thereupon entered a de-

cree of foreclosure and ordered a sale of the property by a special master (R. 37).

In his petition for appeal, appellant also sought to have enforcement of the decree stayed during the pendency of the appeal without giving security therefor (R. 38), but this was denied (R. 38-39).

The action of the Court in sustaining appellee's motion for judgment on the pleadings, in decreeing foreclosure and sale of the property, and in refusing to allow the appeal without bond for damages being posted, in order to supersede the enforcement of the decree, were the assigned errors (R. 39-40).

When the case was docketed in the Circuit Court of Appeals, appellant submitted to that court a motion for a stay of the enforcement of the decree appealed from during the pendency of the appeal without furnishing a supersedeas bond. On hearing, this motion was denied by the Circuit Court of Appeals, so that question is not subject to review.

The certificate sent up by the Circuit Court of Appeals gives us no idea as to the chronological sequence of the happenings leading up to the present controversy as revealed by the record and wholly fails to show what is shown of record as a fact that the Bankrupt estate is not liable for the payment of the note involved.

ARGUMENT

An inspection of the record will show that this motion should be granted for the following reasons:

I.

The question certified is not the real question squarely submitted by the record, and an examination of the entire record is necessary in order to ascertain this.

The question certified is as follows:

> "After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale, by the trustee, of all of the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?"

The real proposition presented for determination by the Record is as follows:

> After a Court of Bankruptcy acquires jurisdiction and possession of the the bankrupt estate, no other court has power, without consent of the former, to interfere therewith by or through subsequently instituted proceedings even to foreclose a valid pre existing mortgage and a judgment of foreclosure and sale, by another court, of a part

of the bankrupt estate in possession of the Trustee and in custody of the Court of Bankruptcy, is a nullity.

While the question certified involves a determination of the question whether or not a foreclosure proceeding (subsequent to bankruptcy) may be commenced and prosecuted to conclusion, it is limited in its scope to the question whether or not such may be done without the consent of the trustee in bankruptcy who has been ordered to sell.

The question certified is limited in its scope to those cases in which a foreclosure proceeding is instituted subsequent to the acquisition of jurisdiction by the Court of Bankruptcy while the question apparent, both from the certificate and the record, is—May such proceedings be had after the acquisition by the Court of Bankruptcy of possession as well as jurisdiction?

In this case it is vital that there be a determination of the validity of the judgment of foreclosure and sale, because if it be determined that an interference with the Trustee's possession is a nullity, he should be restored to possession. The question certified does not, in our judgment, require a determination of the validity of the judgment of the Court. The question is presented by the record.

II

The question certified is susceptible of the interpretation that there is lodged in a court in which foreclosure proceeding have been instituted to foreclose

a lien on property which is in the custody and under the jurisdiction of a court of bankruptcy, without consent of the latter court, the right to determine whether or not the foreclosure proceeding shall be entertained in view of the absence of a showing by the Trustee of due diligence in the administration of the estate. (In the Eighth Circuit there is a rule to the effect that the court of bankruptcy in which a proceeding to foreclose a valid pre-existing lien has been filed, or the Referee, or the Circuit Court of Appeals, in reviewing proceedings of the court of bankruptcy, may determine whether or not the Trustee has been properly diligent in the administration, as a basis for permitting interference with the Trustee's administration by foreclosure proceedings. See *First Trust Co. v. Baylor*, 1 Fed. (2) 24). While on the merits, it seems obvious to us that such supervisory jurisdiction is lodged exclusively in the court of bankruptcy, and not in any other bankruptcy or other court, the question is presented, and as presented, it is necessary that the entire record be brought up in order to ascertain that there was no evidence introduced on the trial of the case. The judgment was rendered on the pleadings of the plaintiff, appellee here, and the defendant, the appellant here. The motion for judgment on the pleadings was treated as a demurrer, admitting the truth of the facts alleged in the appellant's answer, which are somewhat contrary to the facts stated in the certificate in the following respects:

Appellant was appointed as Trustee in Bankruptcy herein on the 14th day of September, 1928, at Fort

Worth. (R. 21.) The 12,000 acres of timber land in Arkansas, involved herein, were held in trust for the bankrupt at the time of the adjudication, although the land was duly scheduled and on the 17th day of October, 1928, Mrs. Cunningham's Trustee conveyed the land to appellant by deed recorded on the 29th day of October, 1928, in the proper records of Benton County, Arkansas, where the principal body of the land was situated (R. 22). The State Banking Department of Missouri, which owned the note for which the land in question was mortgaged as security, procured an order from the Circuit Court of Greene County, Missouri, on the 20th day of October, 1928, authorizing the sale of the note, but it was not endorsed and delivered to the appellee until the 7th day of December, 1928. (R. 22). (See the endorsement on the note, itself, exhibited on page 11.) The instant suit was filed in the Chancery Court of Benton County, five days later. (R. 10, 11.)

It is thus apparent from the record that the Trustee had undisturbed possession for only three months of property comprising, as the certificate and record shows, 12,000 acres of timber land on which there are in excess of 25,000,000 feet of uncut hardwood timber, the exact amount of which the appellant had not been able to ascertain, because the timber cruise belonging rightfully to the bankrupt were in possession of the plaintiff. It was also admitted that this land was actually worth in excess of $125,000.00, and involved an equity on behalf of the estate in excess of $60,000.00.

On pages 23 and 24 of the record are set forth reasons why the foreclosure should not be entertained, in addition to those stated in the certificate.

III.

It is shown by the record (p. 38) that appellant requested the District Court to allow his appeal and to grant a supersedeas of the judgment of foreclosure and sale, without security; that this request was denied, to which he excepted (R. 38-39), and that this refusal was assigned as error. Also, that appellant requested the Circuit Court of Appeals to stay the enforcement of the decree without requiring him to give security therefor, and that this relief was denied except on condition that appellant would give security to pay the interest accruing on the note sued on during the pendency of the appeal. In this connection, it was made to appear to that court, on said motion, that the sale would take place on May 6, 1929, unless stayed. (See Supp. to Ptd. Record.)

The question thus arising on the record having been finally determined by the Circuit Court of Appeals adversely to the appellant should, we respectfully submit, be considered and passed upon by this Court. This is especially true as it is the only other question in the case.

The facts shown in the record and necessary in order to determine this question are as follows:

J. L. Cunningham was the maker of the note sued on. He died some years ago, leaving all of his prop-

erty, by will, to his wife, Henrietta E. Cunningham, the bankrupt. The instant suit turned out to be one wholly in rem, as none of the defendants appeared, except appellant, who was in possession of the property upon which the mortgage lien existed. The bankrupt estate was not liable for the indebtedness sued on, nor any part thereof, so that the judgment of the District Court operated directly and solely against the property.

In denying a stay of the foreclosure sale without security being furnished, the trial and the circuit courts, in effet, held that the Trustee *in possession* was bound to assume and pay a debt not owing by the bankrupt estate to hold his possession. In other words, whatever security he might have given would have resulted, in the event of an adverse determination, in the estate being compelled to pay a debt it did not owe, and this without regard to the mortgage security.

The holding of the trial court and the Circuit Court of Appeals on this question is, in effect, under the facts in this case, a requirement that the United States District Court for the Northern District of Texas, give bond, payable to the Hobbs Tie & Timber Company, in order to maintain and hold possession of the mortgaged property.

The effect of the holding of the Circuit Court of Appeals likewise was, in effect, a holding that the Trustee should obligate the estate to pay for the delay incident to the foreclosure proceeding. (See *Omaha Hotel Co. v. Kountze*, 107 U. S. 378,) where it was